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IN THE

Supreme Court of the United States

October Term, 1952.

No. 580.

PACIFIC STEAMSHIP CO.,

Petitioner,

v.

FLORENCE S. HOLLIDAY, as Administratrix of the Estate of Clinton Holliday, Deceased,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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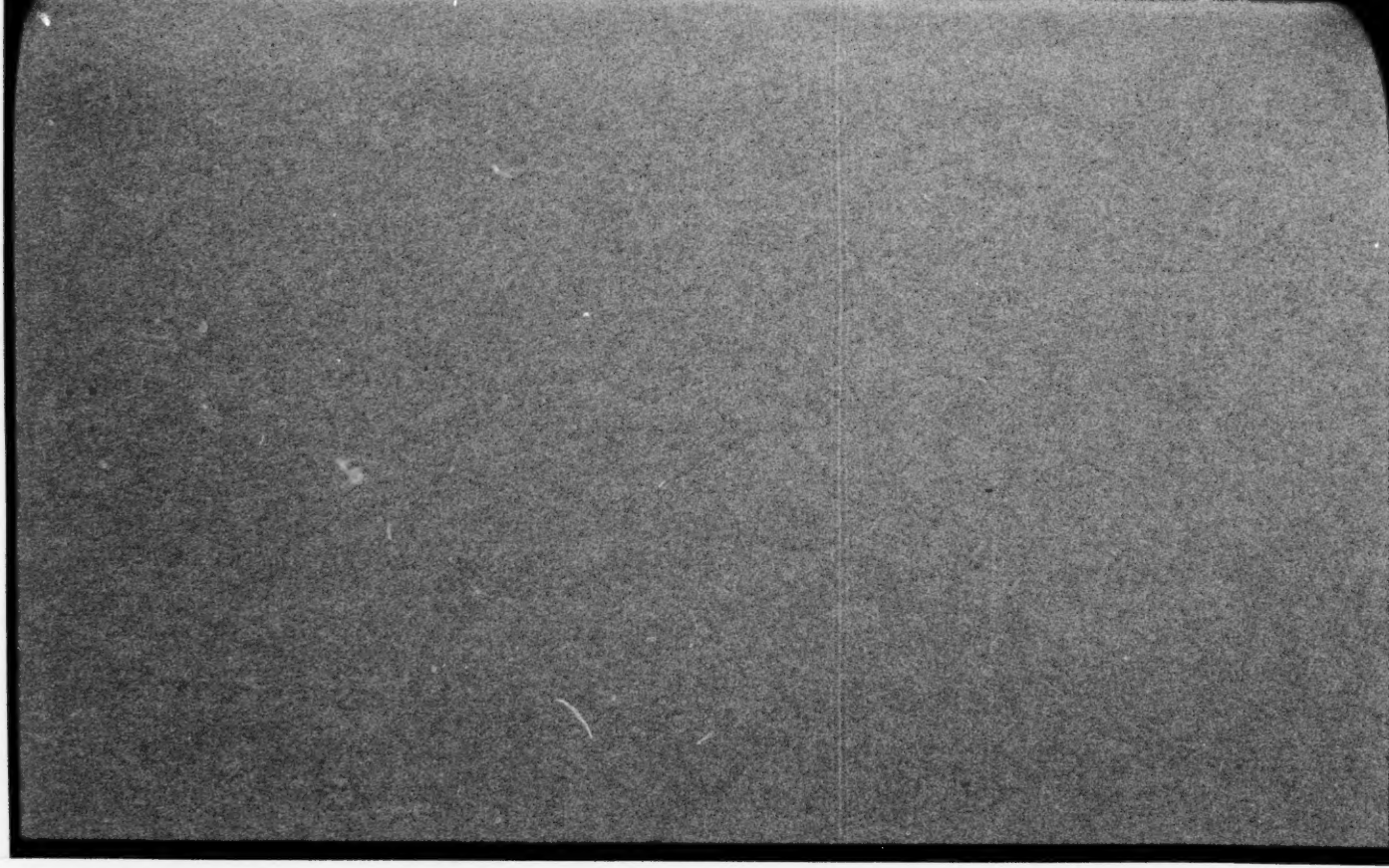

TABLE OF CONTENTS OF BRIEF.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Summary Statement	2
Argument	4
The Record Clearly Sustains the Findings of the Court of Appeals	5
The Ex Parte Affidavits	10
There Is No Important Question of Law Involved.	12
Conclusion	13

TABLE OF CASES CITED.

	Page
Crist v. U. S., 163 F. 2d 145, cert. den. 332 U. S. 852	5
Matson Navigation Company v. Pope and Talbot, Inc., 149 F. 2d 295	5
The S. C. L. No. 9, 114 F. 2d 964	5

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FLORENCE G. HOLLIDAY, AS ADMINISTRATRIX OF THE ESTATE OF CLINTON HOLLIDAY, DECEASED.

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OPINIONS BELOW.

The opinion of the District Court is reported at 99 F. Supp. 173. The opinion of the Court of Appeals for the Third Circuit is reported at 197 F. 2d 610.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Does the record support the fact findings of the Court of Appeals below that petitioner was negligent in failing to provide prompt medical treatment, which failure resulted in the seaman's death.

SUMMARY STATEMENT.

Clinton Holliday was employed on petitioner's vessel, the "Peter Kerr" as a ship's cook for a voyage commencing in November, 1941 from New York to South African ports and return. In the course of that voyage, on February 1, 1942, while the vessel was approaching the harbor of Port Elizabeth in South Africa, Holliday was procuring some meats from the ship's refrigerator when his left ankle was lacerated and punctured by several strands of wire which protruded from a box of provisions on the floor of the refrigerator (R. 34-35). The incident was reported immediately to the Second Mate, and medical attention was requested by the delegate for the steward's department. The Mate made no examination but furnished a lotion to be applied to the injured leg (R. 35). The following morning, as Holliday "turned to" at 6:00 A. M. and continued with his usual duties, he began to experience pain in the leg and he developed a decided limp by the time the vessel arrived in Port Elizabeth about noon on that day. Later on during the day the pain in the leg became so bad that the delegate advised Holliday to lie down and he again reported the condition to the Mate (R. 36). Thereafter, the Captain and the Mate came down to Holliday's quarters and made an examination but did nothing more. By that time the ankle had already become swollen at the site of the wound (R. 39). The vessel lay in Port Elizabeth for three days, during which "the skin rose up like a water blister around the ankle" (R. 43). The vessel left Port Elizabeth on February at 4:23 P. M., bound for Capetown. During this phase of the voyage, an examination of Holliday's leg by the ship's delegate revealed that: "It have a big pus on the side and black-like water in it" (R. 41). The pain became so intense that Holliday was "talking out of his head" and it was thought he was going to jump overboard (R. 43). The vessel arrived in Capetown and dropped anchor in the roadstead on February 7 at 7:18 P. M. but no doctor was

summoned and no arrangements made to obtain medical attention. The following morning, February 8, the vessel was shifted to a pier but no doctor was brought aboard until 12:30 P. M. of that day about seventeen hours after the vessel's arrival in port (see deck log). At that time Holliday's leg was swollen to twice its normal size, and Dr. Shapiro, the physician who had been summoned, found him to be irrational, delirious and suffering from a severe septicemia (R. 114). Pursuant to Dr. Shapiro's instructions, Holliday was removed to a hospital immediately, but the infection had so far progressed that he went steadily downhill and he died ten days later (R. 114).

This lawsuit was instituted on behalf of the widow of the decedent claiming damages upon the ground that: (a) the accident was due to the negligence of the employer and the unseaworthiness of the vessel because of the unsafe condition caused by the protruding wires; and (b) that petitioner failed in its duty to provide proper medical care under the circumstances.

The District Court dismissed the libel, holding that, while the protruding wires constituted a dangerous condition, it was transitory in nature and for which the shipowner could not be held responsble. That Court also held that the Captain and the Mate had done all that was possible for Holliday and that, therefore, petitioner had not failed in its duty to provide prompt and adequate medical care.

The Court of Appeals considered the case de novo, it being in admiralty, and after a penetrating analysis of the record, held that the testimony of the Captain and the Mate was not worthy of belief and reversed the decision of the District Judge upon the testimony of impartial witnesses and documentary reports and log books.

Thereafter, petitioner moved for a rehearing in the Court of Appeals, and annexed an ex parte affidavit of the Captain to the petition, in which petitioner attempted to excuse its delay of seventeen hours before obtaining medical aid after arrival in Capetown. In explanation of that delay,

Captain Butler deposed that upon arrival in Capetown he was prevented from entering the harbor by the naval authorities because of wartime conditions and for that reason was unable to obtain medical aid or to take Holliday ashore for medical attention (R. 170-172). In opposition to the petition for rehearing, respondent obtained the affidavits of the naval authorities in Capetown, including the Director of the South African Naval Forces stationed in Capetown, the Port Captain at Capetown harbor, and the officer in charge of the Signal and Radio Station in Capetown at the time of the incident involved herein. The affidavits of these officials squarely repudiated the affidavit of Captain Butler. They disclosed that on the very night that the "Peter Kerr" arrived, another vessel arrived shortly thereafter and entered the harbor without incident (R. 181); that if the master of the "Peter Kerr" had desired medical aid for a member of the crew, he had the following alternatives open to him: (1) he could have taken the vessel into the harbor, (2) he could have used a launch to bring Holliday into the harbor, or (3) he could have had a doctor brought aboard from the harbor (R. 181-182).

The Court of Appeals denied the petition for a rehearing.

In this proceeding petitioner seeks to have this Court review the fact findings of the Court of Appeals.

ARGUMENT.

While petitioner contends that there is no evidence in the record to support the findings of the Court of Appeals, it is clear that petitioner's complaint goes to the credibility of the witnesses rather than to the lack of evidence.

The Record Clearly Sustains the Findings of the Court of Appeals.

The nub of the controversy centers around two controversial witnesses, the Captain and the Mate of the vessel. Their testimony was accepted by the District Judge in exonerating the vessel from liability. The Court of Appeals rejected that testimony in reversing the District Court and premised its decision upon documentary evidence and the testimony of impartial witnesses. The petitioner assails that decision on the ground that the Court of Appeals should not have substituted its judgment for that of the District Judge in testing the credibility of the Captain and the Mate.

It is a settled rule that an appeal in admiralty partakes of a trial de novo and serves to vacate the decree of the District Court. *Crist v. U. S.*, 163 F. 2d 145, cert. den. 332 U. S. 852. The findings of the trial judge, when supported by competent evidence, are entitled to great weight and such findings will not normally be set aside by the Court of Appeals except upon a showing that they are clearly erroneous. *The S. C. L. No. 9*, 114 F. 2d 964. The basis for the latter rule is "that the trial judge has a peculiar opportunity for appraising the worth of oral testimony by observing the witness' demeanor which the cold print of a record fails to disclose". *The S. C. L. No. 9, supra.* That rule is modified where the findings of the District Court are based on depositions. *Matson Navigation Company v. Pope and Talbot, Inc.*, 149 F. 2d 295; *Crist v. U. S., supra.* In the latter case the Court of Appeals reversed the District Court, where part of the testimony was rendered orally in open court and part was taken by deposition.

In the instant case, the testimony of the Captain and the Mate was taken by deposition. A brief review, touching upon the highlights of the testimony of these two witnesses, will demonstrate why the Court of Appeals found that neither of these two witnesses testified truthfully.

Both the Captain and the Mate testified that Holliday had never sustained any accident and that his trouble stemmed from numerous sores on both legs which pre-dated his service on the vessel. This testimony was squarely contradicted by the examining doctor in Capetown, who testified that there were no sores on Holliday's legs other than the infection on the left ankle where the wires penetrated the leg when he examined him at the time of his removal from the vessel (R. 116).

Captain Butler testified that Holliday had come to him long before the accident, complaining of trouble with his legs; that he examined him at that time and found open sores over both legs. He further testified that about three months later, shortly before the vessel arrived in Capetown, he made another examination and Holliday's condition "was pretty much the same general condition that there was at the commencement of the voyage" (R. 83). When pressed regarding the swelling of the leg, he said that there was "not any particular swelling" (R. 83).

As has already been pointed out, the Captain's testimony in attempting to attribute the illness to "sores on both legs" was discredited by the testimony of the examining doctor in Capetown. The Captain's testimony regarding the swelling is squarely refuted by the ship's own papers. The record discloses that the Captain kept two sets of records—one, the record required by law, and another, a private record for the use only of the petitioner. The Federal statutes require (46 U. S. C. A. 201 et seq.) that every vessel shall have an official log book, and the master is required to record therein "every case of illness or injury happening to any member of the crew, with the nature

thereof and the medical treatment". This log book must be deposited with the Shipping Commissioner at the end of the voyage and it then becomes public property.

In the instant case the Captain made an entry in the official log book which was completely contrary to the facts as he knew them at that time. Under date of February 8, the day that Holliday was removed to the hospital, the Captain made this entry in the official log:

> "Feb. 8, 1942
>
> Capetown, S. A. Clinton L. Halliday, Ch. Cook, this day hospitalized on recommendation of Doctor H. L. Shapiro. Halliday's lower legs and feet were badly swollen with eruptions and blisters. Illness was not diagnosed.
>
> (Signed) WILLIAM H. BUTLER,
> Master."

Compare that entry with the one which was entered in the private scrap log made on the same date:

> "2/8
>
> C. Holliday, Cook, pain in left leg. Soap liniment. *Leg was swollen to twice its normal size.* Soaked in epsom salts solution. *Diagnosed* by Dr. Shapiro *as blood poison.* Sent to hospital in Capetown where he died. Illness report made."

Note first of all that this latter entry in the private log refers to one leg and not both legs, as does the official log; note that the private log specifically identifies the condition as being "swollen to twice its normal size", as against the sworn testimony of the Captain that there was "not any particular swelling"; note that the private entry shows the condition was diagnosed as "blood poisoning", while in the official log the Captain stated that the "illness was not diagnosed". Both of these entries were made on the same day, so that there could be no question about faulty recollection, nor could there be any room for misundertaking.

The testimony of the Mate is of like character. In his deposition he testified that for the three months period prior to the accident he had been treating the decedent for "open sores" on his legs. Yet, there is not a single entry either in the official or private log to support any suggestion that the decedent had either complained of or had been treated for any such condition. The Mate testified that when he first noticed the sores, he figured something was wrong with Holliday's blood (R. 137), the clear implication being that Holliday was afflicted with a venereal disease. On cross-examination he was reminded that if he had had any suspicion that Holliday was afflicted with a venereal disease, he would have been required to remove him from duty at once, particularly since Holliday was the ship's cook. Realizing the blunder which he had made, the Mate then changed his testimony and stated that he thought Holliday was suffering from diabetes (R. 153). He was then unable to explain why he failed to obtain medical aid at any time during the three month period for treatment of such a serious ailment, nor was he able to offer any explanation for the absence of entries in the log books.

It is small wonder that the Court of Appeals rejected the testimony of the Captain and the Mate as being unworthy of belief. That Court accepted the testimony of Dr. Shapiro, the examining doctor in Capetown, which testimony clearly reveals the negligence of this respondent in failing to obtain proper and prompt medical attention for the decedent.

When Dr. Shapiro was first called aboard the vessel, he examined Holliday and found "an intensely swollen leg with underlying celluitis and large blisters. Holiday was then irrational and delirious and also suffering from septicemia" (R. 114). In the hospital Holliday was treated with sulphonamide products, but his condition was so bad that he went steadily downhill, and he died ten days after admission (R. 114).

The original injury which Holiday suffered in the refrigerator was a relatively minor one which could have been overcome very easily, but as time passed without adequate treatment, the wound became infected and the timing of medical treatment became a highly important factor in checking the progress of the infection. In this connection, Dr. Shapiro pointed out (R. 115):

> "It would appear that the original injury was a minor one for such cleansing might and would have been treatment, but when the leg began to swell and the ankle became 'sore and pussy' and 'the skin rose up like a water blister around the ankle' *while the ship was in Port Elizabeth, he should have been taken ashore for treatment in Hospital.*"

On cross-examination, petitioner sought to shake the testimony of Dr. Shapiro by suggesting that a Dr. Bester may have examined Holilday while the vessel was in Port Elizabeth and advised that it was not necessary to remove Holliday from the vessel. In response to that question, Dr. Shapiro answered (R. 121):

> ". . . I find it very difficult to believe that a doctor of Doctor Bester's standing would have permitted the patient to sail in the ship with his leg in the condition stated in the interrogatory. I have no knowledge of the treatment which was prescribed by Dr. Bester."

Significantly, petitioner failed to take the testimony of Dr. Bester, although it was readily available. The trial of this case took place in November, 1947. Dr. Bester died three years later, in 1950. No attempt was made to take his testimony before the trial or at any time during the three-year period after the trial until his death. The inescapable inference is that Dr. Bester either never examined Holliday when the vessel was in Port Elizabeth, or if he did, his testimony would have been the same as that of Dr. Shapiro.

The record is replete with evidence which suports the findings of the Court of Appeals that petitioner failed in its duty to provide proper and prompt medical care and attention, resulting in the decedent's death. The Captain's indifference to Holliday's condition and his need for medical treatment is matched only by his reckless disregard for the truth. On the basis of this record, the Court of Appeals reached the inescapable conclusion that petitioner was grossly negligent in failing to observe the most elemental principles of due care under the circumstances.

The Ex Parte Affidavits.

Petitioner's contention with respect to the ex parte affidavits is indeed most extraordinary and amazing. It is contended that the ex parte affidavits offered by the respondent improperly influenced the Court of Appeals and they should not have been received because such affidavits are not evidence and not admissible into the record (petitioner's Pet. for Cert. pp. 6-7).

The fact of the matter is that the decision of the Court of Appeals was rendered on the basis of the record made in the District Court and its opinion was filed before any ex parte affidavits were presented. After the Court of Appeals had rendered its decision, this petitioner filed a petition for rehearing *and along with that petition submitted an ex parte affidavit of the same Captain Butler whose testimony had already been repudiated by the Court.* In that affidavit Captain Butler deposed that at the time the vessel arrived in Capetown, the British naval authorities would not permit it to enter the port until the following day and that he was prevented from obtaining medical attention or sending Holliday ashore for treatment (R. 172). It was urged by the petitioner, on the basis of that affidavit, that Captain Butler could not be held liable for the delay of seventeen hours in obtaining medical attention at Capetown.

In reply to the petition for rehearing, respondent pointed out that the affidavit of Captain Butler was dehors the record and could not properly be considered in the disposition of the case. However, in order to protect against the possibility that the Court might be misled by the "facts" in Captain Butler's affidavit, respondent obtained the affidavits of naval officials in charge of the port of Capetown at the time of the incident involved herein and attached them to the answer to the petition for rehearing. Those affidavits were made by the Director of the South African Naval Forces stationed in Capetown, the Port Captain at Capetown harbor, and the officer in charge of the Signal and Radio Station in Capetown. The sworn statements of those officials are in direct irreconcilable conflict with the affidavit of Captain Butler. The official log of Capetown harbor, an excerpt of which is annexed to the affidavits, discloses first of all that on the very night the "Peter Kerr" arrived, another vessel arrived shortly thereafter and proceeded into the harbor without difficulty (R. 181). The South African officials further deposed, inter alia (R. 181, 182):

> "5. Had the Master of the S. S. Peter Kerr wished to obtain urgent medical aid for a member of his crew, the following courses were open to him
>
> (a) He could have reported to the Boarding Officer at the arrival line. He in turn would have reported to the Chief Examining Officer who was in wireless contact with my station and with the Port Captain's Office.
>
> (b) After anchoring he could have contacted my signal station by lamp or flag requesting medical aid. (It was not dark until approximately 2015 on 7th February 1942.)
>
> "I am not able to state whether any such request was made, as signals of that nature were not logged.

If such a request was made the authorities would have acted as follows:

Either (a) Given permission to dock the vessel

or (b) Used the naval launch to bring the man into the harbour,

or (c) Sent a doctor from the shore to the vessel in the roadstead,

or (d) Sent a port craft (as opposed to the naval launch) to bring the patient ashore.

"I know of my own knowledge that these courses were open and available at that time because I frequently handled messages from incoming vessels requesting medical aid; and I know that assistance was given in the manner indicated."

It was thus demonstrated that the "facts" newly alleged by Captain Butler were not facts at all but merely irresponsible statements from a witness whose testimony had already been discredited. Aside of the merits of the controversy, it is most surprising that petitioner should now complain about the filing of ex parte affidavits in view of the fact that it was the petitioner which introduced the ex parte affidavits in the first instance and respondent's affidavits were solely and exclusively in rebuttal to petitioner's affidavit. To now make it appear that respondent initiated the practice of filing the ex parte affidavit and that the Court of Appeals below was influenced in its decision by that document exceeds the bounds of legitimate argument.

There Is No Important Question of Law Involved.

The issues raised in the petition for certiorari do not involve the interpretation of any rule of law or statute. The petition simply seeks to have this Court review the evi-

dence in the hope that this Court may accept the testimony of the Captain and the Mate as against that of the impartial witnesses and documentary evidence in this case. This Court has steadfastly declined to grant review in such cases. In this case there is every reason to deny the petition in view of the particular circumstances involved.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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